

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 2447/2000

In the matter between:

LIBERTY LIFE ASSOCIATION OF AFRICA LTD

Applicant

and

PROF G C KACHELHOFFER NO

1st Respondent

W JURD AND 22 OTHERS

2nd and Further Respondents

JUDGMENT

VAN REENEN et JALI JJ:

- 1] When this review served before us on 20 September 2000 we were, by agreement between the legal representatives of the applicant and second and further respondents (the respondents), called upon to adjudicate three issues **in limine litis**.

2] One of those issues was whether the applicant had complied with the provisions of Rule 53 relating to the making available of “the record of the proceedings” and if not, the impact thereof on the further conduct of the proceedings in which the applicant seeks the review of certain judgments, orders and/or determinations made by the Industrial Court.

3] We in our judgment handed down on 12 April 2001, reported as **Liberty Life association of Africa v Kachelhoffer NO and Others** 2001(3) SA 1094 (C), found that it was impossible, at that juncture, to decide whether the applicant had complied with the provisions of Rule 53(3) as regards the furnishing of certified copies of the record to the registrar and the respondents.

4] It was common cause at the earlier hearing before us that the applicant had not made a complete copy of the record of the proceedings available to the respondents and/or their attorney. Empowered thereto by the provisions of Rule 53(3) the applicant furnished “copies of such portions of the record as may be necessary for the purposes of the review” to the registrar and the respondents. That record, hereinafter referred to as the attenuated record, consisted of 126 selected pages of the

transcribed record of the proceedings as well as seven annexures. That record was subsequently supplemented by two further pages of the transcribed record as well as four annexures.

5] One of the issues between the applicant and the respondents was whether the review was capable of being decided on the attenuated record or whether the comprehensive record was essential for that purpose.

6] As the applicant, in addition to the attenuated record, at the hearing provided the court with what the applicant contended was the comprehensive record of the proceedings before the Industrial court, its counsel, in response to repeated requests from the court to signify on which of the attenuated- and comprehensive records the review had to be adjudicated, in the clearest of terms, elected the former.

7] We in our judgment, at 1116 E, articulated our inability to have decided whether the review could be decided on the attenuated record as follows:

“The decision of that issue will entail an assessment of whether it is possible to decide the merits of each of the grounds on which the review is based on the attenuated record and will be inextricably intertwined with a consideration of the merits of the review. As by agreement between the parties the merits of the review are to be adjudicated later, we deem it inappropriate to consider the adequacy, or otherwise, of the attenuated record at this juncture.”

8] It is implicit in the provisions of Rule 53(3) which provides that

“... the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the

review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof ...”

it is for an applicant to decide whether a comprehensive or merely portions of the record should be so furnished. Accordingly, the applicant’s legal representatives by having decided that the attenuated record was sufficient for the adjudication of the review, acted fully within their powers.

- 9] We, when we handed down our judgment, were unaware of the decision of the Supreme Court of Appeal in **SACCAWU and Others v President, Industrial Tribunal & Another** 2001(2) SA 277 in which it was held, at 282 D, that an applicant in review proceedings who does not furnish an adequate record to the court, runs the risk of not discharging the onus, especially where the allegations upon which he, she or it relies are placed,

in issue. That finding, to us appears to be consonant therewith that the record of proceedings assailed on review, in circumstances where, such as in the instant case, the review is based on the contents thereof, becomes part of the evidential material on which the review is to be decided. There does not appear to be any basis in principle or logic why the aforementioned finding in the SACCAWU case should not also find application where the record on review consists of only portions of the record of the proceedings. In the light of the judgment in the SACCAWU case the following view expressed by us in our judgment can no longer be supported:

“If the record of the proceedings is materially defective or if it is impossible to decide the review on such portions of the record as have been made available, a court may, by analogy with the situation in the case of an appeal, refuse to entertain the application until the record is put in order and mulct the responsible party in such wasted costs as may have resulted (See: **The Civil Practice of the**

Superior Court of South Africa 4th Edition, 92).”

10] The applicant on 15 February 2002, served on the applicants’ attorneys and filed with the registrar, a notice in terms of Rule 53 in the following terms:

“KINDLY TAKE NOTICE that the Applicant hereby serves and files the following documents on the Second and Further Respondents in terms of A comprehensive copy of the record of the the abovementioned rule:

1. Proceedings in the Industrial Court, together with a copy of the bundles of documents to which reference was made in the Industrial Court, which documents are duly certified by the Applicant as being true copies.
2. That the Applicant hereby serves and files further documents as being part of the record mentioned in 1 above for purposes of the review and to which the Applicant may refer to during the review proceedings. The pages to which the applicants will refer are as follows: pp. 1238, 2141, 2126-2167, 1789 -1811, 1950-1953, 1049-1058, 1427-1428, 1440-1442, 1450-1451, 1731-1732 and 1734-1739, 1224-1225, 1052-1053, 1069-1070, 1071-1072, 1210, 1816-1817, 1876, 2029-2030, 2105, 1202-1206, 2119-2120, 2128-2129, 1507, 1752, 2163, 2157-2158, 1042, 1327, 2184, 1090, 1507, 1542, 1549-1550, 1739, 1101, 846,

1465-1466. Copies of the aforesaid pages are annexed as part of the record as mentioned in 1 above. The Applicant reserves the right to refer to any other pages of the record which has now been duly served on the Second and Further Respondents in anticipation of any argument relating to the review process. Save for the above the Applicant does not intend to amplify, amend, add or vary the terms of the notice of motion.

3. The Second and Further Respondents are duly afforded the opportunity within 30 days after service of this notice on them to deliver any further affidavits they may desire to file in answer to the allegations made by the Applicant.”

11] The applicant on 15 March 2002 launched an application in which it claimed the following relief:

- “1. That the late service of the comprehensive record of the proceedings in the Industrial Court together with a copy of the bundle of documents to which reference was made in the Industrial Court, under Case No NHK 11/2/4871, be condoned:
2. Costs of the application in the event of opposition thereof;
3. Alternative relief.”

12] The respondents opposed the granting of the relief prayed for in that application and launched a counter-application in which they claimed an order in the following terms:

- “1. Declaring as impermissible the steps taken by the applicant pursuant to its “Notice in Terms of Rule 53” dated 9 May 2001.
2. Directing that the costs of this application stand over for later determination;
3. Alternative relief.”

13] The applicant’s application for condonation of the late furnishing of the comprehensive record is based on a flimsy ground namely, deference to the view expressed by respondents’ counsel during argument that it was impossible to decide the review on the attenuated record. That ground was expanded upon in the applicant’s answering affidavit to the counter-application so as to include a) that the applicant has

been advised that the question whether the attenuated record is sufficient or not could result in a further postponement of the review proceedings and, b) that the judgment of the Supreme Court of Appeal in the SACCAWU case, in which it was held that an applicant who does not furnish the record to the court, runs the risk of failing to discharge the onus, had been brought to the applicant's attention and that that consideration prompted the decision to file the comprehensive record.

14] The respondents' counter-application was based on two grounds. The first was that the applicant's "notice in terms of Rule 53" of 9 May 2001 was in conflict with the applicant's unequivocal election to proceed with the review on the basis of the attenuated record and, in the absence of an application to this court for leave, was impermissible. The second was that the applicants' failure to have filed a comprehensive record at an earlier stage of the proceedings was no longer capable of being cured or condoned.

15] In our view the choice given to an applicant in terms of Rule 53(3) namely, to furnish a comprehensive or

an attenuated record, does not entail an election between two inconsistent remedies the election of one whereof constitutes an unequivocal abandonment of the other (See: **Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO and Another** 1965(4) SA 373 (A) at 380 H; **S v Moos** 1998(1) SACR 372 (C) at 381 g). Accordingly, nothing precluded the applicant, who elected to have the review adjudicated on an attenuated record, from changing its mind and having it adjudicated on a comprehensive record of the proceedings, subject however to the caveat that follows. The applicant as a result of the reconsideration of its election is seeking the introduction of additional documentary material at a juncture when certain points **in limine** have already been adjudicated upon. One of those issues related

to the question whether the requirements of Rule 53(3) had been complied with. We in our judgment did not finally dispose of that issue. Accordingly, the applicant cannot as of right now deliver a comprehensive record of the proceedings. As the applicant is seeking an indulgence in extant proceedings, it could only do so with the leave of this court after a substantive application in which the existence of good or sufficient cause has been shown to be present (See: **Silber v Ozen Wholesalers (Pty) Ltd** 1954(2) SA 345 (A) at 352 H). Whether or not good cause exists, depends on the exercise of a judicial discretion by a court on the basis of all the circumstances of a particular case, with a view to achieving fairness between the parties (See: **Torwood Properties (Pty) Ltd v South African Reserve Bank** 1996(1) SA 215 (W) at 228

B).

16] To the extent that the applicant is seeking to introduce what is tantamount to additional evidential material and the cases that have established the criteria for the introduction further evidence may be of guidance, Leon J said the following in **Barclays Western Bank v Gunas and Another** 1981(3) SA 91 (N) at 96 G:

“The considerations which should guide a court in an application of this kind and which are referred to in the cases should in my view, be regarded as guides rather than fixed principles and in the end the fact of each particular case must be decisive in deciding what is the fair and just order to make.”

17] The reasons provided by the applicant for the introduction of the comprehensive record are simple and convincing. The applicant has been advised, on the strength of the judgment in the SACCAWU case, that if the stance that the attenuated record is the

record of the proceedings is persisted with, there is a real risk that this court may find that the applicant has failed to discharge the onus that rests on it or that a further postponement could result. In order to obviate those possibilities, the applicant wishes to introduce the comprehensive record. Two records of the proceedings before the Industrial Court appear to be in existence. The record prepared for the pending appeal in the Labour Appeal Court and the record the applicant endeavoured to furnish in terms of its notice of 9 May 2001. As the record on appeal has been available to the respondents' legal representatives and they have consistently adopted the stance that the review had to be argued on the basis of a comprehensive record, there is no possibility of any prejudice to the respondents should the applicant be permitted to furnish a comprehensive record. To do so would furthermore obviate further delays and also

serve the convenience of this court.

- 18] The problem is that the applicant did not in its notice of motion seek an order permitting it to substitute the attenuated record with a comprehensive one. Can the applicant be permitted to file the comprehensive record under the claim for alternative relief? As regards the ambit of a claim for general or alternative relief **I. Isaacs: Beck's Theory and Principles of Pleading in Civil Actions**, 5th Edition at 61 – 62 states as follows:

“Besides the exact relief thus prayed for it is usual to make an alternative claim for “general or alternative relief”, a claim known as the “salutary clause”. The object of this is to ensure the granting of such other relief as the premises of the declaration and the evidence at the trial may warrant the court in granting, even though it has not been specifically claimed. The extent to which the salutary clause may be permitted to cover claims which have not been specifically made cannot be precisely indicated, but from the opposite and negative point of view it can

be said definitely that it will not operate to permit the granting of relief which is of quite a different nature from that primarily sought, at all events where the necessity for that relief is not revealed by the pleadings and established by the evidence.”

19] The relief the applicant claimed in prayer 1 of the notice of motion was that the late service of the comprehensive record of the proceedings be condoned. There is nothing in Rule 53(3) which obliged the applicant to furnish a comprehensive record of the proceedings. Neither does the said sub-rule describe a time-limit for the furnishing of a comprehensive or an attenuated record. The applicant elected to file an attenuated record rather than a comprehensive one and accordingly complied with the provisions of Rule 53(3). In our view, the applicant in its notice of motion misconceived the relief that it requires. What the applicant requires is an indulgence, namely, to furnish a comprehensive record of the proceedings in extant review proceedings after it made an election to furnish an attenuated record. We are of the view that such relief is sufficiently similar in nature to the relief

originally claimed and founded on fundamentally similar factual averments and accordingly, it would be competent to grant it under the prayer for alternative relief.

20] We accordingly incline to the view that the applicant could, under the prayer for alternative relief, be permitted to substitute the attenuated record of the proceedings with a comprehensive one within 21 calendar days of the date on which this order is made by furnishing same in the manner and to the parties prescribed by Rule 53 and such an order is granted.

21] As the order in paragraph 20 above obviates the need for the granting of the relief sought in prayer 1 of the respondents' counter-application no order is made thereanent.

22] The applicant in its notice of motion sought an

indulgence and an order for costs in the event of the respondents opposing its application. However, as the respondents' opposition of the application was reasonable they, in our view, are entitled to their costs of opposition on a party and party basis and it is so ordered.

23] The respondents in their notice of motion in the counter-claim asked for a direction that the costs thereof should stand over for later determination. In response to a question from the court the parties' counsel appeared to be in agreement that it was undesirable for the costs of the counter-claim to stand over for later determination. We share that view. As the merits of the counter-claim have not been decided we incline to the view that liability for the costs thereof should be determined on the same basis as in the case where a matter has been settled and the only remaining issue is costs. In such a case courts determine which of the parties would probably have succeeded on the merits on the basis the facts at their disposal (See: **Gamlan Investments (Pty)**

Ltd and Another v Trillion Cape (Pty) Ltd and Another 1996(3) SA 692 (C) at 700 C – 701 G). In our view the decision in the counter-claim would in all probability have been in favour of the respondents and accordingly they are entitled to their costs on a party and party basis and it is so ordered.

24] The review application is postponed to 21, 22 and 23rd August 2002.

25] It is understood that heads of argument for the appeal before the Labour Appeal Court have already been drafted on the basis of the record on appeal. As it would simplify and facilitate the drafting of heads of argument in the pending review proceedings it is recommended that the applicant should furnish the record of the Labour Appeal Court

as the comprehensive record in the review. Counsel indicated that they would recommend such a **modus operandi** to their respective clients and we express the hope that their recommendations will be given effect to.

D. VAN REENEN

T. S.B.JALI